IN THE SUPREME COURT OF THE UNITED STATES

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October Term, 1977

77-1694

No. 77-6994

BENJ. FRANKLIN FEDERAL SAVINGS
AND LOAN ASSOCIATION,
a corporation,

Petitioner,

v.

DERENCO, INC., a Nevada
corporation,

Respondent.

SUPPLEMENTAL BRIEF FOR RESPONDENT IN RESPONSE TO MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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INTRODUCTION

The Solicitor General suggests that the petition for writ of certiorari be granted for the limited purpose of vacating the judgment below and remanding

the case for consideration of certain Federal Home Loan Bank Board regulations[1] dealing with short-term savings accounts. Remand for this limited purpose is suggested notwithstanding the fact that neither Petitioner nor the Board itself, as amicus curiae before the Supreme Court of Oregon, relied upon such regulations in advancing their preemption contentions below. The Solicitor General further submits that the petition should be denied in the event the Court concludes that remand for this limited purpose is inappropriate.

Respondent submits that the regulations relied upon by the Solicitor General have no application to the facts of this case. Remand for the purpose of considering their significance would be inappropriate.

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[1] 12 C.F.R. §§ 541.5, 544.1, and 545.1-1(g).

DISCUSSION

1. The Regulations of the Federal Home Loan Bank Board Relied Upon by the United States Do No Apply to This Case.

Although Federal savings and loan associations might theoretically have authority to treat tax and insurance reserves as "short-term savings accounts," the simple fact is that Petitioner here did [2] did not. The record of the proceedings in

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[2] The Solicitor General's reliance upon the 1970 opinion of the Board's General Counsel as authority for the proposition that Federal associations had discretion with respect to the payment of interest on tax and insurand reserves is misplaced. Such discretion (authorized in connection with short-term savings accounts by 12 C.F.R. §§ 544.1(b)(10) and 545.1-1(g)) would exist not "because they were short-term savings accounts" (Solicitor General's Memorandum, page 5), but only because they were established and treated as such by the association. It is by no means axiomatic that the tax and insurance payments authorized by 12 C.F.R. 545.6-11 are in all cases established and

the trial court clearly indicates that Petitioner did not treat its borrowers' tax and insurance payments as deposits to savings accounts (short-term or regular), and that Petitioner drew a clear distinction between the savings accounts of its depositors and the tax and insurance payments of its borrowers. The record further reveals that none of the steps necessary to establish savings accounts and treat such payments as deposits thereto were taken by Petitioner in connection with its loan agreements.[3/]

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treated as short-term savings accounts. Indeed, as stated in a subsequent opinion of the General Counsel, such accounts are "occasionally" established as merely one of several procedures followed by savings and loan associations in connection with tax and insurance payments. Annotated Manual of Statutes and Regulations, supra, ¶ 1053, n. 4 (Op. G. C. September 21, 1970).

[3/] In order for a borrower's reserve payments to be treated as deposits to a short-term savings account, each borrower's savings account would have to be established

In each of Petitioner's semi-annual Comparative Statement of Condition reports for the period December 31, 1968

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in accordance with specific Board regulations. Federal associations are required to obtain executed signature cards from the holders of such accounts at the time the accounts are opened. 12 C.F.R. § 545.2(a). In addition, associations are required to issue to the holders of such accounts an account book or certificate evidencing ownership of the account. 12 C.F.R. § 545.2(b). Forms for account books and certificates are specifically prescribed in the Annotated Manual of Statutes and Regulations, supra, at ¶ 796, n. 6. In order for an association to periodically withdraw a borrower's tax and insurance payments from a savings account so established, it would also be necessary for the borrower-account holder to execute a nontransferable order or authorization on behalf of the association authorizing withdrawal of the funds and permitting payment to third parties. 12 C.F.R. § 545.4-1(a). See also Annotated Manual of Statutes and Regulations, supra, ¶ 771, n. 55 (Op. G. C. April 24, 1969) ("A borrower agrees to establish a savings account with the mortgagee-association for the payment of real estate taxes and insurance; regular payments are to be made into the account, the passbook is to be kept by the association, and the borrower signs a blanket withdrawal form that

through June 30, 1975,[4] tax and insurance payments were listed as a liability under the heading "Other Liabilities" rather than under the heading "Savings Accounts." (Tr. 84-86, Exs. 6-1 through 6-15). In other statements of condition, the tax and insurance reserves were designated as a liability under a heading entitled "Adv. Pymt. by Borrowers-T & I" rather than under the savings account heading entitled "Total Savings inc. Interest" (Ex. 7-2).

None of the Loan Application forms contained in Petitioner's Mortgage Loan Manual refer to the establishment

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permits the association to use the funds to make the required payments. This is a security device and does not violate Federal Charter provisions.").

[4] The Comparative Statement of Condition reports reveal the assets and liabilities of the association for each six month period (Tr. 82).

of a savings account for tax and insurance payments, nor do such forms contain any provisions with respect to the various procedures required to establish such an account.[5] Although an acknowledgment set forth at the bottom of the forms states that "I have had your plan explained and agree to its terms * * *. I understand that * * * the reserve for taxes and insurance must be paid each month * * *," tax and insurance reserves are referred to under the headings "Monthly Repayment Plan" and "Office Record" merely as "Tax Fund" and "Fire Insurance Fund." (Tr. 198, 202-227, 230-233, 360; Exs. 18B, 26, 28-36, 38, 40). Moreover, pages of the Mortgage Loan Manual setting forth procedures for tax and insurance reserves (Tr. 199-202, 228, 232; Exs. 25, 37, 39) contain no

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[5] Discussed in n. 3, supra.

directions or instructions with respect to the establishment of savings accounts in connection with such reserves, and no procedure with respect to such accounts was referred to during testimony describing the nature of discussions about tax and insurance payments which occur during interviews with loan applicants either prior to or in conjunction with completion of the Loan Application form (Tr. 359-360, 363).

Furthermore, the Annual Re-Cap of Mortgage Loan Transactions furnished annually to each of Petitioner's borrowers[6/] reveals merely that a certain amount of each monthly payment was applied to the "Tax

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6/ The "re-cap" sets forth the amounts paid by the borrower during the year, the dates of such payments, and the application of each payment to principal, interest, and tax and insurance reserves (Tr. 280; Ex. 10).

Fund," the "Fire Insurance Fund," and, when applicable, the "Other Tax Fund." (Ex. 10). It is not unreasonable to assume that if Petitioner's borrowers had in fact established savings accounts into which their tax and insurance payments were to be deposited, some reference to such an account would appear on the recap form.

Finally, even though "99 percent" of Petitioner's borrowers were required to make reserve payments for taxes (Tr. 416, 427-428), only 4,500 (approx.) of Petitioner's 30,000 (approx.) borrowers had savings accounts with the association (Tr. 419).

2. Even if the Regulations of the Federal Home Loan Bank Board Relied Upon by the United States Were Applicable to This Case, it Would be Inappropriate for this Court to Grant Certiorari for the Purpose of Further Review.

It is apparent from the foregoing that the Board regulations regarding savings

accounts have no application to this case.[7] Even if they did apply, however, it would be inappropriate for this Court to grant certiorari for the limited purpose suggested by the Solicitor General. Unlike Massachusetts v. Westcott[8] upon which the Solicitor General relies, this is not a case in which the outcome upon remand would be controlled by a recent decision of this Court disposing of the questions raised in the petition.

At no time during the proceedings below did Petitioner or the Board, as amicus curiae, rely upon or advance

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[7] The theoretical possibility that tax and insurance payments might, under certain circumstances, have been treated as deposits to savings accounts is an abstract issue which is not presented by the facts of this case--an issue which should be considered neither by this Court nor the Supreme Court of Oregon.

[8] 431 U.S. 322 (1977). See also McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940).

the savings account contention raised by the Solicitor General.[9] In exercising its appellate jurisdiction, it is the policy of this Court to set aside or reverse state court determinations only to the extent that such determinations are erroneous, and error is not to be predicated upon the failure of the state court tc resolve issues not properly presented to it. McGoldrick, supra, at 435. This is consistent with the policy of the Supreme Court of Oregon. See Oregon State Bar v. Wright, 280 Or. 693, 573 P.2d 283 (1977) and Warren v. Parsons, 224 Or. 605, 356 P.2d 983 (1960).

CONCLUSION

Respondent respectfully submits

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[9] The obvious reason for this is that the regulations simply do not apply to the facts of this case.